Supreme Court, U.S.
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No. 98-1761

In the Supreme Court of the United States

RAINSONG COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION AND DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner failed to file its petition for review of an order of the Federal Energy Regulatory Commission within the statutory period prescribed by 16 U.S.C. 825*l*(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 151 F.3d 1231. The March 28, 1997 order of the Federal Energy Regulatory Commission (Pet. App. 25a-36a) is reported at 79 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,338. The Commission's June 13, 1997 order denying rehearing (Pet. App. 37a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1998. A petition for rehearing was denied on December 2, 1998 (Pet. App. 9a). The petition for a writ of certiorari was filed on March 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). Jurisdiction to adjudicate petitioner's claims under 16 U.S.C. 825*l*(b) is disputed.

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, provides that a party aggrieved by an order of the Federal Energy Regulatory Commission (Commission or FERC) may obtain judicial review in the court of appeals by filing "within sixty days after the order of the Commission upon the application for rehearing[] a written petition praying that the order of the Commission be modified or set aside in whole or in part." 16 U.S.C. 825*l*(b). The FPA further specifies that orders of the Commission "shall be effective on the date and in the manner which the Commission shall prescribe." 16 U.S.C. 825h. To implement those statutory mandates (among others), the Commission promulgated 18 C.F.R. 385.2007(b)(1), which provides:

> (1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following:
>
> (i) Posts a full-text copy in the Division of Public Information;
>
> (ii) Mails or delivers copies of the order to the parties; or
>
> (iii) Makes such copies public.

Finally, 18 C.F.R. 385.2007(c)(1) provides that, "[u]nless otherwise ordered by the Commission, rules or orders are effective on the date of issuance."

2. In 1984, petitioner applied to FERC for a license to build a hydroelectric project in the Olympic National Forest. Pet. App. 25a. Under the FPA, "licenses shall

be issued within any [forest] reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired[.]" 16 U.S.C. 797(e). After an initial round of proceedings before the Commission and the court of appeals (see Pet. App. 10a-24a), the Commission denied petitioner's application as inconsistent with the purposes for which the forest was created (*id.* at 25a-36a), and it reaffirmed that disposition in an order denying rehearing (*id.* at 37a-49a). The Commission issued the latter order on June 13, 1997, posting it in the agency's Public Reference Room on that date. See *id.* at 3a, 8a n.1. Several days later, on June 18, the Commission's Secretary mailed petitioner a copy of the order, which stated on its face that it had been issued on June 13. See *id.* at 5a, 8a n.2.

On August 15, 1997, petitioner filed a petition for review in the court of appeals (Pet. App. 3a), which dismissed the petition as untimely. The court explained that 16 U.S.C. 825h delegates to the Commission the authority to determine the date on which an order becomes effective; that, under 18 C.F.R. 385.2007(b), the order in question was issued on June 13, 1997, the date it was posted, not on the slightly later date on which it was mailed; and that petitioner's appeal was therefore untimely because it was filed more than 60 days after June 13. Pet. App. 3a-8a.

ARGUMENT

The court of appeals' disposition of this case was correct and warrants no further review.

Any party challenging a final order of the Commission must file a petition for review within 60 days "after the order." 16 U.S.C. 825*l*(b). Congress granted the Commission authority to determine the "date" on

which, and the "manner" in which, "[o]rders of the Commission shall be effective." 16 U.S.C. 825h. Despite petitioner's contrary suggestion (Pet. 8), Congress did not distinguish among the "purposes" (*ibid.*) for which the Commission may exercise its authority to determine the date and manner of an order's effectiveness; that authority is unqualified, and it encompasses the authority to determine when the period for filing a petition for review begins to run. The Commission's regulations specifically provide that an order is "deemed issued" (and is therefore "effective") when the Secretary either "[p]osts a full-text copy in the Division of Public Information," "[m]ails or delivers copies of the order to the parties," or "[m]akes such copies public," whichever is "earliest." 18 C.F.R. 385.2007(b)(1) and (c)(1). That regulation disposes of the question presented here, for it confirms that the period for filing a petition for review began on June 13, 1997, 63 days before petitioner filed its petition for review. See generally *Mesa Airlines* v. *United States*, 951 F.2d 1186, 1188-1189 (10th Cir. 1991); *National Black Media Coalition* v. *FCC*, 760 F.2d 1297, 1299 (D.C. Cir. 1985).[1]

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[1] *Hill* v. *Hawes*, 320 U.S. 520 (1944), upon which petitioner relies (Pet. 8), is inapposite. In that case, a district court had failed to serve the parties with copies of its order, and the time for filing a notice of appeal expired before any service was made. To make the losing party whole, the district court vacated its initial order and reentered its judgment, thereby resetting the clock for filing a notice of appeal. This Court upheld that disposition as within the district court's "sound discretion." 320 U.S. at 524. That holding does not support the proposition that a minor, nonprejudicial delay in service confers a constitutional right on a party to disregard the effective date of an administrative order when calculating the period for filing a petition for review. The court of appeals cases on which petitioner relies (Pet. 8-9) are similarly inapposite. In *City of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982), the court

Petitioner nonetheless contends (Pet. 6) that the Commission failed to comply with 18 C.F.R. 385.2010(g)(2), which requires service "not later than the date of the filing," and that this alleged non-compliance delayed the order's date of issuance for purposes of appellate review. Even if Section 385.2010(g)(2) were properly construed to apply to orders of the Commission itself in addition to the "filing[s]" of parties appearing before the Commission, the provision would have no bearing on the issue presented here. Section 385.2010(g)(2) simply addresses the timing of service; it does not address an order's effectiveness or date of issuance, and it cannot operate to toll the relevant period for filing a petition for review. See generally *Stone* v. *INS*, 514 U.S. 386, 405 (1995).

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assumed without discussion that the order in question was issued on the day it was mailed; although a dispute arose concerning the manner of that mailing, the court ultimately resolved the timeliness question on unrelated grounds. *Id.* at 72-73 & n.14. In *Energy Probe* v. *NRC*, 872 F.2d 436 (D.C. Cir. 1989), the agency's order was both signed and mailed on the same date, and the court held only that the period for filing a review petition began on that date rather than the later date on which the aggrieved party received the mailing. *Id.* at 437-438. Finally, in *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112 (8th Cir. 1977), the dispute involved whether the period for filing a petition began on the date of the ICC's final order or only after the ICC subsequently denied a discretionary administrative appeal, an issue not presented here. See *id.* at 1114-1115. Although the court added that the period began when the aggrieved party "received notice" of the order denying the administrative appeal (*id.* at 1115), it did not explain why receipt was the triggering event, and even petitioner does not argue that receipt is the triggering event here. See Pet. 8 (arguing that the relevant period here began when "notice had been sent").

Finally, petitioner claims that "the effect of the decision of the Court of Appeals is to completely liberate FERC from any obligation to serve its decisions upon applicants at all, opening the door to agency abuse and manifest injustice." Pet. 5. That is incorrect. The court of appeals specifically declined to "address the case where an agency intentionally violates its regulations and notifies a party of its decision so late that the party cannot file a timely notice of appeal." Pet. App. 8a n.2. This is certainly not such a case: Although the Commission mailed petitioner a copy of the order on June 18 rather than June 13, the order stated on its face that it had been issued on June 13, and petitioner could not plausibly claim that the minor delay in service prejudiced its ability to file a petition for review within 60 days of that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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